

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-576

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J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D., ROBERT WHITE-STEVENS, Ph.D., *Petitioners,*

v.

NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR., *Defendants,*

and

THE NEW YORK TIMES COMPANY, ROLAND C. CLEMENT, *Respondents.*

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## MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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Pacific Legal Foundation hereby moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari to the Court of Appeals for the Second Circuit filed October 18, 1977 in the above-captioned proceeding. Consent to the filing of the brief has been withheld by counsel for Roland C. Clement.

Pacific Legal Foundation is a non-profit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. The Foundation has more than 20,000 members, contributors, and supporters throughout the United States. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys.

The Foundation participates in and has devoted a substantial portion of its resources to cases relating to nuclear energy, pesticide regulation, public lands management and public assistance administration. In such areas, the "public interest" is frequently a subject of highly emotional debate. It has been the experience of the Foundation that public minded scientists and scholars will volunteer their expertise on both sides of such public interest issues and thereby provide perspective and basis for intelligent review and debate. Without such voluntary participation, the quality of governmental decision making will decrease and the public interest will suffer. It is the deep concern of the Foundation that the decision below will establish character assassination as an uncontrolled tool of the irresponsible as a means to deter these scientists and scholars from continuing this laudatory practice of participation in public affairs.

The accompanying brief urges this Court to grant the petition for certiorari. Pacific Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues.



Accordingly, Pacific Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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## BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI

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### INTEREST OF AMICUS

Pacific Legal Foundation is a non-profit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. The background and interests of *amicus* are detailed in the preceding motion for leave to file this brief.

## INTRODUCTION [1]

> It is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves.[2]
>
> Chief Judge Kaufman

This case presents a dilemna resulting from the need to protect the dissemination of information, *i.e.*, freedom of the press, while also insuring the development and protection of sources of information, *i.e.*, individual freedom of speech. In this context, issues presented for review are:

1. Whether the Second Circuit Court of Appeals has chilled petitioners' right to speak freely and unthreatened on public issues, thereby violating their first amendment rights.

2. Whether the Second Circuit Court of Appeals has violated the seventh amendment through failure to give proper weight to fact findings of the jury.

3. Whether the Second Circuit Court of Appeals gave unbalanced pre-eminence to freedom of the press at the expense of individual freedom of speech to the detriment of the public interest.

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[1] The petition for certiorari delineates the facts and includes the opinions of the courts below. Citations are made to the Petitioners' Brief, Appendices.

[2] *Edwards, et al.* v. *National Audubon Society*, Nos. 1026/7 (2d Cir. May 25, 1977), Petitioners' Brief, App. A at 2A.



## STATEMENT

### The Public Interest Requires A Restatement Of *New York Times* v. *Sullivan*

In 1964 this Court declared: "The Constitutional guarantees [of the first and fourteenth amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-80 (1964). Three members of the Court, in two concurring opinions, proposed a rule of unconditional immunity from libel actions based on criticism of the official conduct of public officials.

Over the years since *Sullivan,* the courts have extended the rule of the majority opinion concerning libel of public *officials* in *official* conduct to public *figures* in their *public* conduct. However, some courts, the Court of Appeals for the Second Circuit in particular, have created such an impossible burden of proof as to malice in libel cases that the majority rule in *Sullivan* has lost legal significance and the unconditional immunity rule prevails.

#### A. Petitioners' First Amendment Rights

The evolution of *Sullivan* occurred to guarantee freedom of the press and to avoid the chilling effect of the threat of libel suits on public dissemination of information on public issues. While these objectives are laudatory, the process has left the first amendment rights of public figures, such as petitioners, vir-

tually unprotected with a chilling of the public discussion and debate the decisions sought to protect.

Petitioners here are noted scientists and scholars whose comments must be encouraged in the free discussion of serious scientific issues. The falsity of the statement which precipitated the suit against Clement and the New York Times, to wit, that petitioners were "paid to lie," was not questioned by the Second Circuit Court. Nothing better characterizes the significance of the libel than the Second Circuit's own description:

> It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than "paid liar." It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees.
>
> Petitioners' Brief, App. A at 17A.

If the Second Circuit's decision is permitted to stand, petitioners, and others of similar standing, are left with the knowledge that future participation in public scientific debate may again subject them to similar calumny and to the "scorn and ridicule of [their] colleagues." Might not this knowledge create a chilling effect on participation in public debate of issues? Is there no chilling effect on petitioners' first amendment rights of free speech? Will scientists and scholars of lesser courage be likely to volunteer their expertise in public debate of serious technical issues? The unfortunate result of this decision in the name of a free press, is the sacrifice of an element of individual freedom of speech; the printed form has been elevated over informational substance.



**B. Petitioners' Seventh Amendment Rights**

The factual questions of malice were submitted to a jury. Actual malice was found in the case of Roland C. Clement; the New York Times was found to have acted with reckless disregard of whether or not the article published was false. These jury decisions followed review of evidence including testimony of witnesses and observation of their demeanor and attitude. In response to motions for judgment *n.o.v.,* the District Court reviewed the evidence and the jury's findings and concluded that the verdicts were proper and consistent with the evidence. The Court of Appeals, accepting some of the jury's findings, substituted its own judgment and, despite the District Court's review, concluded that there was insufficient evidence to support the jury findings.

It is conceded that the appellate court has the right to review the evidence to ensure that, as a matter of law, there was no error made below. The seventh amendment, however, precludes re-examination of facts tried by a jury except in the manner described in *Sullivan.* 376 U.S. at 285 n.26. The Court of Appeals' overturning of the jury verdict is an unwarranted rejection of circumstantial evidence of malice in libel cases which does violence to the seventh amendment and to the evidentiary review exemplified in *Sullivan.*

**C. Proof of Malice in Libel Cases**

The Second Circuit extended its elimination of malice in libel cases involving public figures when, on November 7, 1977 it supported the right of a news reporter to refuse to respond to cross-examination

concerning his state of mind at the time of his libel.[3] Public figures now find themselves in an impossible position: they may sue for libel only when they can establish malice pursuant to the *Sullivan* majority opinion but are not permitted to submit circumstantial evidence to a jury for determination of malice or to establish malice through interrogation of the author of the libel. In short, a public figure will have a sustainable suit for libel only in that rare case when the libeling partly publicly proclaims his malice. If however, the libeling party publicly declares that he speaks without malice and if the libeling party has the foresight to merely acknowledge that his victim disagrees with his libelous statements, while providing no rebuttal of the factual allegations of the libel, that party will be secure from any libel suit and may even earn the plaudits of the Second Circuit as "the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps." (Petitioners' Brief, App. A at 14A.).

The special duty that "public officials" owe to the public and the need for close scrutiny to avoid official misfeasance might well justify the minority concurring opinions in *Sullivan,* as applied to those specific facts. However, it is doubtful that even the *Sullivan* minority would have applied the unconditional immunity rule to "public figures" who volunteer their expertise in public debate of important issues. Public figures who seek to benefit the public through participation in informational public debate should not be left totally unprotected from the calumny of detractors or the wanton disregard of truth that may result

[3] *Herbert* v. *Lando,* No. 77-7142 (2d Cir. Nov. 7, 1977).



from zealous but irresponsible reporting. It is not suggested that public figures are entitled to immunity from unfair criticism. It is submitted that there is a vital public need for balancing freedom of the press with freedom of speech.

Whether it is freedom of the press or freedom of individual speech that is repressed, freedom of full discussion of issues is chilled and the public loses. The original rule of the *Sullivan* majority provides a measure of protection to a public figure and strikes a balance between freedom of the press and individual freedom of speech. Public debate of issues will be fostered in an atmosphere which encourages both responsible journalism and the development of technical and scientific information from public figures.

## SUMMARY

Granting of the petition for certiorari in this case is essential if the Supreme Court is to breathe new life into the majority opinion in *Sullivan.* If this is not done, a public figure who values his reputation will have no recourse other than to remain silent except, perhaps for the alternative described in an article in the November 30, 1977 Washington Post, entitled "Judge Says Fighting Is Only Libel Remedy." (Reproduced in Appendix A.) While the title of the article somewhat exaggerates the actual statement of Judge Brieant, it exhibits the public frustration over the trampling of one set of constitutional rights in the name of another. Re-examination of *Sullivan* is in the public interest.

## CONCLUSION

It is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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# APPENDIX

THE WASHINGTON POST Wednesday, Nov. 30, 1977 D 11

# Judge Says Fighting Is Only Libel Remedy

By Jerry Knight
Washington Post Staff Writer

Recent libel law rulings have so limited the right to collect damages that public figures may have to "resort to fisticuffs or dueling" to get satisfaction, a federal judge in New York says.

"Practical litigants may well conclude that any remedy for libel against a journalist by a public figre is now illusory," decreed Judge Charles L. Brieant.

Brieant, a federal judge in the southern district of New York, made the comment last week when he dismissed a $37.5 million libel suit against Barron's magazine.

Barron's was sued by Reliance Insurance Company after the magazine criticized a stock offering by the company in July, 1976.

Reliance claimed the critical story forced it to raise the dividend rate on the preferred stock offering by one percentage point, thus costing $7.5 million over the life of the issue. It asked an additional $30 million in punitive, special and general damages.

After months of legal maneuvering and "a mound of paper, submitted by both sides" Judge Brieant issued a summary judgment in September that dismissed the case without a trial. He upheld that decision last week.

In his latest decision, the judge said he threw out the case because Reliance Insurance "will be unable at trial to prove actual malice."

Noting that several court decisions have required public figures to prove malice before they can collect damages, Brieant linked his decision to the case of Army Lt. Col. Anthony Herbert against CBS television. Herbert, who accused two of his superior officers in Vietman of committing war crimes, sued CBS after he was the subject of a 1973 Mike Wallace program.

The U.S. Second Circuit Court of Appeals in New York earlier this month dismissed Herbert's libel suit, ruling that he could not ask CBS officials about their "state of mind" when they produced a program about the controversial officer.

Acknowledging it was "breaking new ground in an area of utmost importance," the circuit court said allowing plaintiffs to question journalists about their decision making would have "grave implications for the vitality of the editorial process which [courts] have recognized must be guarded zealously."

Judge Brieant's decision apparently is the first to cite the Herbert case as precedent and to suggest that case and others virtually rule out libel suits considered by public officials.

"The level of clear and convincing proof required now in this circuit to show 'actual malice' in a defamation case is almost insuperable," Brieant said when he first ruled for Barron's.

In reaffirming that action, the judge noted that "a judicial remedy for defamation was regarded, since the earliest days of the common law, as necessary because of the 'supposed tendency (of libel) to arouse angry passion, provoke revenge and thus endanger the public peace.'

"Are men and women of honor who happen to be public figures to right vicious slanders hereafter by resort to fisticuffs or dueling?" Brieant asked rhetorically.

Brieant's ruling came in a suit over an article written by Dr. Abraham J. Briloff, a City University of New York accounting professor who, the judge noted, is known as "the Cassandra of the accountants" because of his frequent criticism of accounting practices.

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